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No. 88-362

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT WILSON, et al.,
Petitioners,

vs.

DONALD E. KUENZI, M.D., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

CRAFT FRIDKIN SHAFFER & RHYNE
JAMES W. SHAFFER
(Counsel of Record)
HAROLD L. FRIDKIN
CHARLES H. STITT
1100 One Main Plaza
4435 Main Street
Kansas City, Missouri 64111
816/531-1700
Attorneys for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3080

QUESTIONS PRESENTED

Does the refusal by the Missouri Supreme Court to recognize either "wrongful birth" or "wrongful life" as actionable tort theories under the common law of that state violate either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

Does this Court have jurisdiction to review a state-court decision on the grounds that it conflicts with the decisions of other state and federal courts on a matter of state law?

Does the standard of appellate review applied by the Missouri Supreme Court in reaching its decision violate the Due Process Clause of the Fourteenth Amendment?

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OPINION BELOW

The opinion of the Missouri Supreme Court in this case is reported as *Wilson v. Kuenzi,* 751 S.W.2d 741 (Mo. banc 1988).

JURISDICTION

Petitioners seek to invoke this Court's jurisdiction under 28 U.S.C. §1257(3). However, the federal questions sought to be presented to this Court were not previously

1. Respondent Kuenzi, Hayes, Kirkland & Wilson, M.D.'s, Inc., has no parent company, subsidiary or affiliate.

raised before the state courts of Missouri; this Court is therefore without jurisdiction over the federal questions presented in the Petition for Writ of Certiorari. *Street v. New York*, 394 U.S. 576, 582 (1969).

This Court is without jurisdiction under 28 U.S.C. §1257 to review those questions presented in the Petition for Writ of Certiorari that do not implicate the Constitution or any statute, treaty or other law of the United States.

SUMMARY OF ARGUMENT

The question presented to this Court regarding the constitutionality of the Missouri Supreme Court's decision rejecting recovery under the theories of "wrongful birth" and "wrongful life" was not previously presented to the state courts of Missouri. This Court is therefore without jurisdiction over the question.

The decision not to allow recovery for "wrongful birth" or "wrongful life" does not violate a woman's qualified right to choose an abortion without state interference, since it erects no obstacles in a woman's path to an abortion in addition to those existing obstacles not created by the state. The decision does not violate equal protection, since it is rationally related to a legitimate governmental goal.

This Court does not have jurisdiction to resolve conflicts among the states regarding the interpretation of their own tort law.

Petitioners' contention that the Missouri Supreme Court applied an inappropriate standard of review does not present a reviewable federal question.

REASONS FOR DENYING THE WRIT

I. This Court is without jurisdiction over the Petition for Certiorari, in that the federal questions raised therein were not previously presented to the state courts of Missouri.

Of the three questions presented by the Petition for Writ of Certiorari (the "Petition"), only two are subject to this Court's jurisdiction. Furthermore, neither of these questions was presented to the state courts of Missouri for decision. This Court is therefore without jurisdiction over any question sought to be raised in the Petition.

The sole statute authorizing this Court to exercise appellate jurisdiction over decisions rendered by state courts is 28 U.S.C. §1257. That statute only authorizes this Court to review state court decisions to the extent such decisions implicate a question of federal law. Of the three questions recited in the Petition, only two make reference to a source of federal law. The third question involves only a conflict among state courts (and federal courts applying state law) concerning a matter of state tort law.

Although the remaining two questions presented in the Petition ostensibly implicate matters of federal law, neither of these two questions was raised before the state courts of Missouri at any stage of the proceeding. Consequently, this Court is without power to review them. *Street v. New York*, 394 U.S. 576, 582 (1969).

The first of these questions is whether the Missouri Supreme Court's decision not to recognize a common-law right of recovery in tort under the theories denominated

"wrongful birth" and "wrongful life" violates petitioners' rights under the Fourteenth Amendment to the United States Constitution. This question, in turn, consists of two related inquiries under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, respectively. This general question and its constituent inquiries were not presented to or addressed by either the trial court or the Missouri Supreme Court.

The focus of the parties before the trial court was the effect of a Missouri statute, Mo. Rev. Stat. §188.130 (1986), which purported to eliminate recovery in tort under either "wrongful birth" or "wrongful life." The trial court granted Respondents' motion to dismiss the petition based on the operation of §188.130. See *Wilson v. Kuenzi*, 751 S.W.2d 741, at 741 (1988). In their brief to the Missouri Supreme Court, petitioners challenged the constitutionality of this section. See Petitioners' Appendix E. In their responsive brief, respondents urged that it was unnecessary to consider the constitutionality of this statute, since the common law of Missouri did not, and should not, recognize recovery under either of these two proffered theories of recovery. See Appendix A. Petitioners, in their reply brief, returned to their previous argument that the statute was unconstitutional. See Appendix B. Petitioners did not raise the alternative argument raised before this Court, that a decision to reject the two tort theories in question as a matter of common law would be constitutionally impermissible. *Id.*

The Missouri Supreme Court, in its decision, agreed with respondents' position, that the common law of Missouri does not recognize a right of recovery in tort for

either "wrongful birth" or "wrongful life." See Petitioners' Appendix A. That court concluded that it was therefore unnecessary to consider the arguments raised by petitioners as to the constitutionality of the statute. *Id.* Although petitioners filed a motion for rehearing, they did not question the constitutionality of the common law rule announced by the court in its decision. See Petitioners' Appendix B.

The question whether a given decision under a state's common law of tort is unconstitutional is clearly parallel to the question of the constitutionality of a state statute that accomplishes the same result. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964). Nevertheless, these two questions are distinct judicial inquiries, and a party who desires a court to address both these questions should be required to raise each of them in sufficiently clear terms to indicate to the court that they must both be addressed. Specifically, where a party is challenging the constitutionality of a statute, and it is apparent that a particular result under the common law would render the statute moot, that party should be required to raise whatever challenge it may have to the common law result before the state courts in order to properly preserve that question for review through certiorari. In this case, petitioners did not present to the state courts of Missouri the question whether the refusal to recognize "wrongful birth" or "wrongful life" under that state's common law would violate the Constitution. Consequently, this Court has no jurisdiction to consider the question. *Street*, *supra*.

The other question petitioners seek to raise in their Petition is whether the scope of appellate review em-

ployed by the Missouri Supreme Court violated the Equal Protection Clause of the Fourteenth Amendment. Although petitioners objected to the scope of review in their motion for rehearing, petitioners did not frame their objection with reference to any source of federal law. See Petitioners' Appendix B. Since petitioners did not present the federal implications of their scope of review challenge, this Court has no jurisdiction to entertain that challenge in this proceeding. *Street, supra.*

II. The decision of the Missouri Supreme Court refusing to recognize either "wrongful birth" or "wrongful life" as a valid theory of recovery under the common law of Missouri does not violate either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

In its decision in this case, the Missouri Supreme Court held that petitioners did not state a claim for relief under Missouri law. Petitioners had alleged that Barbara Wilson received medical care from respondents during her pregnancy, and that respondents negligently failed to inform her that the fetus she carried would be born with Downs' Syndrome. Petitioners also alleged that, had she been so informed, Barbara Wilson would have aborted her pregnancy. In rejecting petitioners' claim for damages as a matter of law, the Court focused on the remoteness of the causal link between the act of neglect complained of and the injury alleged to have resulted therefrom (that Barbara Wilson's child was born with a congenital defect). The Court also noted that a mother's allegation, in a case such as this, that she would have aborted her fetus had she known of its defective condition would be uniquely suscep-

tible to fabrication, and should therefore not provide the basis for an action at law.

The Missouri Supreme Court's decision in this case does not violate the principles recognized by this Court in *Roe v. Wade*, 410 U.S. 113 (1973). In that case, this Court recognized the right of pregnant women to choose whether or not to abort their pregnancies, at least during the early phase of gestation, without interference by the states. This right to be free from state interference with the abortion decision was found to emanate from the Due Process Clause of the Fourteenth Amendment. Subsequent decisions of this Court, however, have made it clear that the principles announced in *Roe v. Wade* only prevent a state from erecting additional barriers to the abortion decision, and do not require a state to ameliorate or remove any obstacles to the making of that decision which are not themselves created by the state. *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

In *Maher*, this Court addressed a challenge to a Connecticut regulation which denied Medicaid funding for all but non-therapeutic abortions. The Connecticut Medicaid program nevertheless provided funding for costs associated with natural childbirth. Although the indigency of pregnant medicaid recipients constituted a limitation on their ability to choose abortion, this Court concluded that the state's refusal to alleviate this limitation—even while assisting those who choose not to abort—did not create an impermissible burden on their right to choose. As this Court stated:

> [t]he Connecticut regulation before us is different in kind from the laws invalidated in our previous abortion decisions. The Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant

> woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation. We conclude that the Connecticut regulation does not impinge upon the fundamental right recognized in *Roe*.

Id., 432 U.S. at 473-74.

Like the regulation upheld in *Maher*, the decision by the Missouri Supreme Court in this case placed no additional obstacles in the path of a woman's decision whether to abort. Here, the crux of petitioners' claim is that Barbara Wilson was prevented from choosing abortion by respondents' failure to provide her with certain genetic testing information. The Missouri Supreme Court concluded that such a failure could not provide the basis of a claim for damages. This decision, even had it been in effect at the time of Barbara Wilson's pregnancy, could not possibly have interfered with her decision whether or not to obtain an abortion. This is particularly true since the existence of a cause of action for "wrongful birth" or "wrongful life" would be of no concern to a woman who believed her fetus to be healthy.

The only conceivable limitation on Barbara Wilson's opportunity to choose an abortion was imposed, if at all,

by her physician. Any such impediment was not erected by the state, and the state was under no obligation to remove it. Since the State of Missouri's refusal to recognize recovery for "wrongful birth" or "wrongful life" did not impose any limitations on the abortion decision that did not already exist, that refusal does not violate the constitutional rights recognized in *Roe v. Wade*. A similar conclusion, in the context of a statute precluding recovery under these two theories, was reached in *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986). There, the court stated that

> if the doctor's inadvertence or carelessness places an obstacle in the path of plaintiff's abortion decision-making, it is placed there by the doctor, not the state. The doctor, not the state, is precluding the patient from making an informed abortion decision. Nor is the doctor's conduct, which is negligence, a form of private discrimination. A doctor who inadvertently fails to provide certain treatment is not engaged in invidious partiality; he is only failing to use due care.

Id., 396 N.W.2d at 17. Furthermore, this Court has previously declined to review a state court decision identical to the one in this case, even though the questions presented in the petition for certiorari were the same as those raised by petitioners herein. See Petition for Writ of Certiorari, *Azzolino v. Dingfelder*, U.S.S.Ct. Docket No. 85-6969 [337 S.E.2d 528 (N.C. 1985), *rehearing denied*, 353 S.E.2d 401 (1987), *cert. denied*, ... U.S. ....., 107 S.Ct. 131 (1986)].

For similar reasons, the decision by the Missouri Supreme Court in this case did not deny petitioners the equal protection of the law. Unless it has a substantial

impact on a fundamental interest or affects with particularity some protected class, a classification imposed by state law must only satisfy the "rational basis" test; that is, it must be rationally related to a legitimate governmental interest. *Lyng v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America,* ..... U.S. ....., 108 S.Ct. 1184, 1192 (1988). In the present case, there is no protected class which is affected by the Missouri Supreme Court's refusal to recognize petitioners' tort claims. Furthermore, the only fundamental interest that could even arguably be impacted by the Missouri Supreme Court's decision in this case is the right to choose abortion without interference from the government. As suggested by the previous discussion, this fundamental right is not substantially impacted by the Missouri Supreme Court's decision, since it erected no state-imposed obstacles in the pregnant woman's path to an abortion. *Hickman, supra,* 396 N.W. 2d at 17. Consequently, the rational basis test applies to petitioners' equal protection claim.

The decision by the Missouri Supreme Court in this case clearly satisfies the requirements of the rational basis test. That test contains two substantive limitations on classifications imposed by state law: the classification must implicate legitimate goals, and it must bear a rational relationship to those goals. *Lyng, supra,* 108 S.Ct. at 1194. The particular classification objected to by petitioners is the classification which distinguishes between plaintiffs asserting claims for either "wrongful birth" or "wrongful life" and those asserting claims under the theory known as "wrongful conception." This classification is not only identified with a legitimate tort-law goal, but is a well-reasoned means of furthering that goal.

As noted by petitioners, the courts of Missouri have recognized a tort cause of action under the theory of "wrongful conception." *Miller v. DuHart,* 637 S.W.2d 183 (Mo. App. 1982). This claim arises where a physician has negligently performed a requested sterilization or contraceptive procedure, resulting in the birth of a healthy, but unplanned, child. The classification that permits tort recovery under such circumstances but denies recovery under the circumstances presented in this case clearly implicates a legitimate goal. This goal is the restriction of tort recovery to those situations in which there is a proximate causal link between the acts of neglect complained of and the injury claimed to be the result.

Furthermore, the classification in question bears a rational relationship to this goal. In the case of a claim for "wrongful conception," there is a clear causal link between the act of neglect—the improperly-performed sterilization or contraceptive procedure—and the injury claimed to be the result—the birth of a healthy, but unplanned, child. In the case of a claim for "wrongful birth" or "wrongful life," however, the causal link is much more attenuated. There, the act of neglect complained of is the failure to provide genetic testing information that a woman may consider relevant to her decision whether to continue her pregnancy to full term. The injury claimed to have resulted is the birth of a congenitally-defective child. Since the child's defective condition is congenital, there is nothing that the treating physician could have done either to prevent this condition or to cure it. The Missouri Supreme Court consequently concluded that the causal link in such cases was too remote to support the recovery of damages. This

conclusion is sufficiently rational to establish that the classification distinguishing between "wrongful conception" and "wrongful birth" or "wrongful life" is rationally related to the goal of confining tort recovery to those instances where proximate causation is shown.

III. This Court is without jurisdiction to resolve conflicts between state courts regarding matters of purely state law.

Petitioners' argument notes that most of the courts that have been presented with the question have permitted recovery in tort for either "wrongful birth" or "wrongful life." Included among these are several federal courts. Only the state supreme courts of Missouri and North Carolina have rejected recovery under these two theories. See *Azzolino v. Dingfelder, supra.*

Petitioners urge this Court to resolve this conflict among the jurisdictions as to whether to permit recovery for "wrongful birth" or "wrongful life"; however, petitioners do not attempt to suggest that this conflict concerns a matter of federal law. Furthermore, those federal courts that have considered claims under these two theories have recognized that the questions presented in such cases are purely matters of state law. See, *e.g., Robak v. United States,* 658 F.2d 471 (7th Cir. 1981) (applying Alabama law); *Phillips v. United States,* 408 F.Supp. 544 (D. S.C. 1981) (applying South Carolina law).

This Court is without jurisdiction to review by certiorari decisions of state courts with respect to matters of state law. 28 U.S.C. §1257. This Court is therefore without power to resolve the conflict noted by petitioners.

IV. The rejection of a tort theory based in part on the unverifiability of the assertions on which it rests does not implicate federal constitutional principles.

Petitioners contend that the Missouri Supreme Court exceeded the applicable scope of review in this case by failing to accept as true petitioners' allegations with respect to causation and damages. This argument misapprehends the fundamental principles of appellate review. Furthermore, the argument fails to present any federal question reviewable by this Court under 28 U.S.C. §1257.

Under Missouri law, an appellate court reviewing a trial court's dismissal of a petition for damages must assume as true all those facts pleaded, together with any reasonable inferences to be drawn therefrom. *Friedman v. Edward L. Bakewell, Inc.*, 654 S.W.2d 367, 368 (Mo. App. 1983). However, conclusions contained in the petition are not to be considered. *Id.* Petitioners' argument misapprehends these principles when it states that

> [u]nder the permissible scope of review, Petitioners were to be presumed to have satisfied the evidentiary hurdles of causation and damages, if their petition adequately set forth these elements, which it did.

Petition for Writ of Certiorari, at 17. It is axiomatic that the existence of legally-sufficient causation and legally-cognizable damages are matters requiring the application of law to the facts, and are therefore conclusions. Consequently, it was appropriate for the Missouri Supreme Court to consider whether the injuries claimed by petitioners were proximately caused by the acts of neglect they complained of. It was also appropriate for the Court to consider the difficulty courts have experienced in determining

an acceptable measure of damages for "wrongful birth" when deciding whether to recognize this theory of recovery.

Petitioners' argument seems to be addressed to the discussion in the Missouri Supreme Court's opinion regarding the problem of verifiability inherent in an action for "wrongful birth." The Court's opinion recognized that such an action must be premised upon the assertion that the mother would have aborted her child had she known of its defective condition. The Court was clearly troubled by the fact that a woman making such an assertion as part of a claim for "wrongful birth" would necessarily be doing so "long after the fact and when it is in her financial interest to do so." *Wilson v. Kuenzi*, *supra*, 751 S.W.2d at 746. The Court concluded that an action for damages should be based on evidence "either more verifiable based upon experience or more verifiable by some objective standard." *Id.*

By focusing on this problem of verifiability, the Missouri Supreme Court was not refusing to presume the truth of the matters alleged by petitioners. Instead, the Court was taking into account a public policy consideration traditionally employed in the tort calculus: the risk that certain classes of tort claims will be overly-susceptible to collusion or fabrication. The relevance of such a risk has been considered, for example, in determining whether or not to preserve interspousal tort immunity. See *S.A.V. v. K.G.V.*, 708 S.W.2d 651, 652 (Mo. banc 1986) (abolishing interspousal tort immunity). Thus, the decision by the Missouri Supreme Court in this case did not deviate from the relevant standard of appellate review.

CONCLUSION

The decision by the Missouri Supreme Court to reject the theories of "wrongful birth" and "wrongful life" does not violate any principle of federal law, and is therefore not reviewable by this Court. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

CRAFT FRIDKIN SHAFFER & RHYNE
JAMES W. SHAFFER
HAROLD L. FRIDKIN
CHARLES H. STITT
1100 One Main Plaza
4435 Main Street
Kansas City, Missouri 64111
816/531-1700
Attorneys for Respondents

APPENDIX

"APPENDIX A"

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN DISMISSING APPELLANTS' FIRST AMENDED PETITION, IN THAT NEITHER "WRONGFUL BIRTH" NOR "WRONGFUL LIFE" IS A VALID THEORY OF TORT RECOVERY IN MISSOURI, AND SUCH PETITION THEREFORE FAILED TO STATE A CAUSE OF ACTION UPON WHICH RELIEF COULD BE GRANTED.

A. It is unnecessary to address either the retrospective effect or the constitutional validity of the statutory prohibition against maintaining an action for "wrongful birth" or "wrongful life" (§188.130, RSMo 1986), since the statute is both an expression of the relevant public policy against recovery under either theory at common law and a precedential basis for rejecting such recovery.

* * *

B. Even in the absence of the statute, the recognition of recovery under either theory would be an unwarranted extension of the common law.

Even were there no such statute as §188.130, there would be sufficient reasons for this Court to refuse to recognize recovery under the common law for either "wrongful birth" or "wrongful life." Most important of these is that the recognition of a cause of action which has

as its genesis the complaint that a life already in being was caused not to be terminated by the acts of the defendant is an unwarranted and unprincipled extension of the common law.

The New York Court of Appeals succinctly stated the rationale for rejecting the theory of "wrongful life" in *Becker v. Schwartz, supra.*

> Simply put, a cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence. This comparison the law is not equipped to make. * * * Recognition of so novel a cause of action requiring, as it must, creation of a hypothetical formula for the measurement of an infant's damages is best reserved for legislative, rather than judicial, attention.

Id., 386 N.E.2d at 812

* * *

Unlike the court in *Azzolino*, this Court may at least be assured that the legislature has considered and resolved the policy issues presented by this case. The result of their deliberations is available to inform this Court as to its decision in this case, and to assure this Court of the resolution of future cases. However, even if this statute were not available to this Court, it would be the responsibility of this Court to defer any affirmative steps towards the adoption of "wrongful birth" or "wrongful life" until such time as the General Assembly had spoken.

C. The United States Constitution does not require states to recognize recovery under their common law either for "wrongful birth" or "wrongful life."

Appellants' brief focuses on the question of whether the prohibition in §188.130 against maintaining a cause of action for "wrongful birth" or "wrongful life" violates the United States Constitution, in light of Roe v. Wade, 410 U.S. 113 (1973). Since the conclusion that there is no remedy for "wrongful birth" or "wrongful life" can be reached according to common law principles, it is unnecessary to address the constitutionality of §188.130. However, appellants' argument does suggest that such a common-law rejection of recovery would also violate the Constitution. Furthermore, it is clear that the constitutionality of a provision of state law does not depend upon whether it was enacted by its legislature or was established by the decisions of its courts. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (in determining constitutionality of rule of state libel law, it is irrelevant whether rule derives from statutory or decisional law).

* * *

* * * ful life" theories. So long as the rule of law which results from this application of public policy does not affirmatively interfere with the abortion decision, *Roe v. Wade* and its progeny create no obstacle to the rejection of either of these two theories.

In the present case, the relevant public policy considerations have been resolved by the General Assembly. This resolution occurred subsequent to the announcement of *Roe v. Wade*, and, to the extent that case established new or additional policy factors, such factors were presumably given their appropriate weight in the legislative determination.

D. Since there is an available legal theory supporting the dismissal of the petition which does not involve the validity of a statute, the trial court's judgment should be affirmed.

In summary, respondents' argument is that it is unnecessary to reach the questions raised in this case regarding the constitutionality, and the constitutionality of applying, §188.130. The judgment in the present case may be affirmed on the basis that there is no common law recovery in Missouri for either "wrongful birth" or "wrongful life." This Court should avoid deciding questions involving the constitutionality of a statute, where there is an alternative way of resolving an appeal. State ex rel. Union Electric Company v. Public Service Commission, 687 S.W.2d 162, 165 (Mo. banc 1985). The existence of the legislative determination of the relevant issues does, however, support the rejection of the two proposed theories as a matter of common law.

It is irrelevant that the trial court stated a different legal rationale for its dismissal of appellants' petition. L.F. at 89-98. The judgment in a court-tried case is to be affirmed if there is available any reasonable legal theory on which to do so. McFadden v. Kelly, 722 S.W.2d 110, 113 (Mo. App. 1986).

For the reasons stated, the judgment of the trial court dismissing appellants' First Amended Petition should be affirmed.

"APPENDIX B"

ARGUMENT

POINT I

RESPONDENTS ANTI-ABORTION PUBLIC POLICY ARGUMENTS ARE FLAWED AND ARE CONTRARY TO THE PREVAILING WEIGHT OF JUDICIAL AUTHORITY.

This reply begins by noting that respondents have adopted appellants' statement of facts. Applicable law requires that the facts established in said statement be viewed in the light most favorable to the appellants and all reasonable inferences therefrom that favor appellants be drawn. *Shapiro v. Columbia Union National Bank and Trust Company,* 576 S.W. 2d 310 (Mo. Banc. 1978).

It should also be noted at the outset that the respondents have failed to respond in their brief to Points II, IV and V of appellants brief and that the arguments and authorities cited therein stand before the court unchallenged.

The main thrust of respondent's argument as repeated time and time again throughout their response is that anti-abortion public policy considerations dictate and justify the original enactment, and continued existence of Section 188.130 R.S.Mo. (1986). Respondent's accord to the statute the status of a "legislative commandment" (respondent's brief, page 11). In their view, since the statute embodies what respondents perceive as public policy, the court need not concern itself with the statutes constitutionality but should simply rubber stamp its validity based upon its enactment alone. Fortunately, courts function as a check and/or balance, not a mere rubber stamp of legislative enactment.

The antiquated public policy argument advanced by respondents has no place in modern day jurisprudence and has been repudiated by the overwhelming majority of courts considering same. It flows from the holding of the New Jersey Supreme Court in the case of *Gleitman v. Cosgrove*, 227 A.2d 689 (1967). The *Gleitman* case was the first reported case to consider the validity of the causes of action of wrongful birth and wrongful life. The court ruled against both concepts. Since *Gleitman* the United States Supreme Court has recognized that women have a constitutional right to choose to terminate a pregnancy. *Roe v. Wade*, 410 U.S. 113 (1973).

Subsequent to *Roe, supra*, the holding of the *Gleitman* case was reconsidered by the New Jersey Supreme Court in the case of *Berman v. Allen*, 404 A.2d 8 (1979). The court reversed its earlier holding in *Gleitman*, and repudiated the view espoused by that case that public policy reasons precluded the judicial allowance of tort damages for denial of the opportunity to take embroyonic life. The court in fact determined that since *Roe, supra*, public policy now supports the right of a woman to choose to terminate a pregnancy.

Discussing the public policy argument advanced by the *Gleitman* court the court in *Berman* observed at page 14:

> "In light of changes in the law which have occurred in the 12 years since *Gleitman* was decided the second ground relied upon by the *Gleitman* majority (anti-abortion public policy grounds) can no longer stand in the way of judicial recognition of a cause of action founded upon wrongful birth. The Supreme Court's ruling in *Roe v. Wade, supra*, clearly establishes that a woman possesses a constitutional

right to decide whether her fetus should be aborted, at least during the first trimester of pregnancy. Public policy now supports, rather than militates against, the proposition that she not be impermissibly denied a meaningful opportunity to make that decision."

Representative of respondent's position is the following excerpt from respondent's brief at page 11:

> "Furthermore, apart from its status as a legislative commandment having the force of law, Section 188.180 (correct section is 188.130) is a resource for the courts of this state in exercising their judgment on questions of common laws similar to those addressed in the statute. It is therefore unnecessary to reach those questions regarding the constitutionality or the applicability of Section 188.130 . . . The existence of the statute is itself a sufficient reason to conclude that as a matter of common law there is no recovery in Missouri for either wrongful birth or wrongful life."

Such reasoning is flawed and ignores constitutional guarantees which must be satisfied in connection with laws enacted which affect individual's basic vested rights.

The public policy considerations which respondent's allege the statute in question embodies are compelling according to respondents because in their view appellants causes of action seek damages against Dr. Kuenzi, et al., for "failing to perform an abortion," or "having failed to extingush a human life."

Such reasoning on the part of respondents is again flawed and mischaracterizes the basis of appellants lawsuit. A review of appellant's allegations of negligence in their First Amended Petition for Damages at (legal file, pages 2, 3 and 4) clearly shows that nowhere in

the pleadings is any recovery sought for failure to cause an abortion or failure to extinguish human life. The allegations set forth are stated in traditional terms of medical malpractice pertaining to breach of the applicable standards of care of a physician in the care and treatment of his patient.

The anti-abortion public policy considerations delineated by respondents in their brief which would allegedly be compromised by recognition of appellant's causes of action are unconstitutional under a long line of case authority.

As shown in appellant's brief under *Roe v. Wade, supra*, only two public policy interests have been recognized as compelling so as to justify enactment and enforcement of Section 188.130 R.S.Mo. (1986), i.e., (1) protecting the woman's health and (2) protecting the potentiality of human life. Only when the fetus reaches viability would the state's interest in protecting and furthering the value of human life become a compelling interest to justify regulation of the abortion decision. *Roe*, 410 U.S. at 159. The court specifically declined to accept the argument that life begins at conception and is present throughout pregnancy. The state is prohibited from adopting one theory of when life begins to enable it to argue that its interest in protecting and furthering life should override the rights of a pregnant woman to choose abortion. *Roe*, 410 U.S. at 162. In the instant case all of the alleged acts of negligence of Dr. Kuenzi occurred prior to viability of the fetus, during a time when Mrs. Wilson would have been entitled to abort her pregnancy under the guidelines of applicable constitutional law. Therefore, there is no public policy which justifies the continued existence of this statute and nothing set forth in respondents brief alters said fact.

Public policy does not favor medical malpractice and suffering. Public policy as embraced by the constitution

of the State of Missouri favors full compensation of an injured party. Public policy also should include a regard for social welfare as affected by careful genetic or other medical counseling through recognized medical procedures. For a court to be encouraged to stand behind a shield of public policy as suggested by respondents, is, in effect, to declare that it is the public policy of the state to immunize doctors from responsibility for their negligence which ultimately results in the birth of a human being who must live with severe birth defects. In such instance the respondents conception of public policy would deny the severely injured child from recovering damages from a clear tortfeasor.

Further, the respondents reasoning places the burden of the child's defects on the parents, the state, society and everyone except the responsible party, the physician. Such result is totally unnecssary in light of the dramatic increase in the quantity and quality of prenatal technology now routinely available in the medical community to test for and identify birth defects.

The Supreme Court of Washington in *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wa. 1983) recognized the advances in medical technology and its impact on tort law when it observed at page 491:

> "Until recently, medical science was unable to provide parents with the means of predicting the birth of a defective child. Now, however, the ability to predict the occurrence and reoccurrence of defect attributable to genetic disorders has improved significantly . . . After conception, new diagnostic techniques such as amniocentesis and untrasonography can reveal defects in the unborn fetus. . . Parents may avoid the birth of the defective child by aborting the fetus. The difficult moral choice is theirs . . . we

> believe we must recognize the benefits of these medical developments and therefore we hold that parents have a right to prevent the birth of a defective child and health care providers a duty correlative to that right. This duty requires health care providers to impart to their patients material information as to the likelihood of future children's being born defective, to enable the potential parents to decide whether to avoid the conception or birth of such children."

The court's final observation at page 491 directly refutes respondent's public policy arguments:

> "The duty does not, however, affect in any way the right of defendant physician to refuse on moral or religious grounds to perform an abortion. Recognition of the duty will promote societal interests in genetic counseling and prenatal testing, deter medical malpractice, and at least partially redress a clear and undeniable wrong."

Far from infringing upon public policy, recognition of the individuals right to recover damages furthers societal interests in promoting quality prenatal health care. Society has a recognized interest in insuring that prenatal screening and diagnosis are performed safely and accurately. Medical professionals have a strong need to keep up their proficiency, be aware of recent developments in their field, recognize their shortcomings, and carry out their work in a setting with an optimal standard of quality control. Free access to the courts for redress of physicians failure to comply with the applicable standards insures that doctors will exercise due care in prenatal counseling and provide parents with the information they are entitled to receive to enable them to make informed procreative decisions.

POINT II

RESPONDENTS RELIANCE ON THE RATIONALE OF THE DECISION IN *MAHER v. ROE,* 432 U.S. 464 (1973) AS AUTHORITY EVIDENCING APPROVAL OF THE STATE OF MISSOURI'S SECTION 188.120 R.S.Mo. IS IN ERROR.

Respondents citing the case of *Maher v. Roe,* 432 U.S. 464 (1973) argue that Section 188.130 R.S.Mo. (1986) does not interfere with the constitutionally protected right to choose abortion because a pregnant woman is still free to elect to choose abortion; the statute merely embodying the state's decision not to facilitate abortion. *Maher v. Roe, supra,* held that a state's refusal to fund abortions does not infringe the exercise of fundamental rights because although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Respondents argument is flawed because the abortion funding cases have no relevance in evaluating the constitutionality of wrongful birth legislation. State funding decisions do not directly affect physician-patient communications and do not constrain information essential to a woman's decision making. Although lack of state funds for abortions may influence the outcome of a woman's choice or affect her ability to carry out her decision not to bear a child, lack of relevant and reliable medical information precludes informed choice altogether.

POINT III

RESPONDENT'S ARGUMENT AND AUTHORITIES REPRESENT A DECIDED MINORITY VIEW PERTAINING TO WRONGFUL LIFE, AND WRONGFUL BIRTH ACTIONS.

Respondents throughout their brief rely time and time again on the cases of *Becker v. Schwartz*, 386 N.E. 2D 807 (1978) and *Azzolino v. Dingfelder*, 337 S.E.2D 528 (N.C. 1985). These decisions are presented as authority for respondent's public policy and causation arguments. It is interesting to note that the *Becker* case is in fact in accord with the majority view adopted by appellant's which recognizes a cause of action for wrongful birth. Respondent's have been forced to resort to quoting from the dissent in that case to find authority for their position. The *Azzolino* case is a North Carolina case and represents a minority view which the Federal District Court of North Carolina refused to follow in the 1986 case of *Gallagher v. Duke University*, 638 F.Supp. 979 (M.D.N.C. 1986). The *Gallagher* decision recognized a cause of action for wrongful birth.

Respondent's limited authorities cited in their brief represent only a decided minority view. The overwhelming weight of judicial authority, 17 jurisdictions, (appellant's brief, pages 19-20), recognize a cause of action for wrongful birth, and four jurisdictions (appellants brief, page 21), recognize a cause of action for wrongful life.

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